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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 22

CHARLES WARNER COMPANY,

Petitioner,

vs.

INDEPENDENT PIER COMPANY,

Respondent.

No. 23

CHARLES WARNER COMPANY,

Petitioner,

vs.

STEAMSHIP GULFTRADE, WESTROP GULF REFINING COMPANY IS CLAIMANT.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR STEAMSHIP GULFTRADE AND GULF REFINING COMPANY, RESPONDENT

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BRIEF FOR STEAMSHIP GULFTRADE AND GULF REFINING COMPANY, RESPONDENT

These are writs of certiorari to review a decision of the Circuit Court of Appeals for the Third Circuit modifying a decree of the District Court (Dickinson, *J.*) for the Eastern District of Pennsylvania.

The cause of action arose out of a collision which occurred on October 1, 1923, in daylight, at the juncture of the Delaware and Schuylkill rivers, between the steamship *Gulftrade* and a hawser tow of barges in tow of the steamtug *Taurus* owned by Petitioner. At the time of the collision the steamship *Gulftrade* was being assisted by steamtugs *Triton* and *F. A. Churchman* furnished by respondent Independent Pier Company. The master of the tug *Triton* was on the *Gulftrade's* bridge in exclusive charge of the *Gulftrade's* navigation as well as the manœuvring of the tugs *Triton* and *Churchman*, all of which were acting under his orders.

The libel was filed by Charles Warner Company, owner of the barges, against the steamship *Gulftrade* and tugs *Triton* and *Churchman in rem* and against Independent Pier Company and Alfred C. Churchman, owners of the tugs, and Gulf Refining Company, owner of the steamship, *in personam*, to recover for damages sustained by the barges as a result of collision with the *Gulftrade*.

Facts

On October 1, 1923, the steamship *Gulftrade*, loaded with a cargo of oil in bulk, was proceeding up the Delaware River bound for Girard Point, Philadelphia. The weather was fair, tide flood, wind northerly. The *Gulftrade* is a single screw vessel of 6,589 tons gross and 4,949 tons net register, 429.3 feet long, 59.2 feet beam and was drawing 26½ to 27 feet (R. 6, 16, 24, 462, 464, 482, 547).

When about off Port Mifflin the *Gulftrade* was met by tugs *F. A. Churchman* and *Triton*, furnished by the Independent Pier Company, which tugs were to assist the *Gulftrade* to a berth at Girard Point. The *Churchman* made fast on the *Gulftrade's* port bow and the *Triton* on her port quar-

ter. The masters of both tugs went on the steamer's bridge. The master of the *Triton* took entire charge and thereafter directed the navigation of the steamer and tugs. The *Gulftrade's* officers were at their customary stations while entering port but took no part in the navigation of the vessel other than to execute such orders as they received from the tug master in charge (R. 370, 401, 547).*

The tug *Taurus*, owned by Charles Warner Company, with loaded scows *Nos. 18, 33, 44,* and *53,* also owned by Charles Warner Company, in tow on hawsers astern, was proceeding up the Delaware ahead of the *Gulftrade* bound for wharves on the Schuylkill River. The *Taurus's* tow was made up in two tiers of two boats each, *No. 53* was the port hawser boat, *No. 18* the starboard hawser boat, *No. 44* the port boat in the second tier, and *No. 33* the starboard boat in the second tier. The flotilla was over 400 feet long and was drawing not over 10 feet (R. 33-34, 547).

The *Gulftrade* was gradually overhauling the tow and exchanged several one blast passing signals with the *Taurus* (The Circuit Court of Appeals found that two and probably three one blast passing signals were exchanged, R. 581). As the *Gulftrade* was about to pass on the starboard side of the tow, as agreed by exchange of one blast signals, the tow sheered or swung to starboard across the *Gulftrade's* course (R. 548, 550, 580-1). The *Gulftrade's* helm was put hard aport, her assisting tugs hard aported, and her engines, as

* The answer filed in behalf of the Independent Pier Company alleged that the navigation of the *Gulftrade* and the tugs was under the order and direction of the officers of the *Gulftrade* but this contention was abandoned at the trial and it was admitted by counsel for the Independent Pier Company that the navigation of the *Gulftrade* and tugs *Triton* and *Churchman* was in the entire charge of the master of the tug *Triton* (R. 192).

well as those of both tugs were used in attempting to swing the *Gulftrade* away from the swinging tow but it was impossible to avoid collision; the starboard boats of the *Taurus's* long hawser tow fetched up against the *Gulftrade's* port bow resulting in damages to scows *Nos. 33, 44* and *18*, loss of cargo on *No. 18* and loss of life of the captain of *No. 18* (R. 377-82).

Decisions Below

The District Court found that the tail of the *Taurus's* hawser tow swung to eastward athwart the channel and across the *Gulftrade's* course. The Court held however that those in charge of the *Gulftrade* were bound to anticipate the swinging of the tow, and that in spite of the agreement, by exchange of one blast passing signals, for the *Gulftrade* to pass on the starboard side of the *Taurus* and her tow, the *Gulftrade* was at fault for the collision (R. 548, 550).

The Circuit Court of Appeals agreed with the finding of the District Court as to the swinging of the tow and held that the *Taurus* was at fault for not keeping her tow in line, *i. e.*, allowing her tow to swing across the channel and embarrass the *Gulftrade* in passing (R. 580-1).

Both the District Court and the Circuit Court of Appeals held also that, although the *Gulftrade's* navigation was in entire charge of the master of the tug *Triton*, who was a servant of the Independent Pier Company, which had contracted to move the *Gulftrade* and berth her, the *Gulftrade* was liable for the negligence of the Independent Pier Company's servant (District Court Opinion, R. 551; Circuit Court of Appeals' Opinion, R. 579, 582).

The final decree reads

"1. That the libellant in the above entitled cause recover of Independent Pier Company, one of the respondents herein,

primarily and from the steamship *Gulftrade* and its stipulator, secondarily, the amount of its damages arising out of the matter set forth in the libel herein, together with interest and costs, and that the said steamship be condemned therefor. Execution against the steamship *Gulftrade* and its stipulator only to be had in the event of failure to collect against the Independent Pier Company."

2. That the libel herein be dismissed as against the steamtug *Triton* * * * (R. 552-3).

Summary of Argument

We shall argue:

1. That the collision was due solely to the failure of the *Taurus* to keep her tow in line.

2. That the steamship *Gulftrade* is not liable *in rem* for the negligence, if any, of the master of the tug *Triton*, who was the servant of the Independent Pier Company.

3. That the tug *Triton* should be held liable *in rem* for the negligence, if any, of her master, who was in charge of the navigation of both the steamship *Gulftrade* and the steamtug *Triton*.

ARGUMENT

POINT I

THE COLLISION WAS DUE SOLELY TO THE FAILURE OF THE TAURUS TO KEEP HER TOW IN LINE.

It is unnecessary to argue or quote at length the testimony substantiating the swing of the *Taurus's* hawser tow. It was clearly testified to by the *Taurus's* pilot. He testified:

"I hauled the tug and the tow under the westerly shore as close as possible to make the mouth of the Schuylkill River, keeping them out of the tide as much as possible.

* * * * * * *

"After the tow was clear of the buoy, going into the mouth of the Schuylkill, the stern barges swung out toward mid-channel. I then ported my wheel for an instant, bearing my tug to the starboard.

Q. What was the purpose of that? A. The purpose of that was to throw the stern (of the) tow to the westerly shore; to pull them in out of the mid-channel.

Q. How long did you keep your wheel to port? A. About half a minute.

Q. And then what was your next movement of the wheel? A. I starboarded my wheel to haul her back on the original course." (R. 36-7).

Again:

"Q. Mr. Dawson asked you about your tow swinging out to mid-channel. Just how far out had your tow swung, as far as you can recollect? A. What part of the tug swung?

Q. Yes. A. The stern of the stern barges in tow swung out near mid-channel.

* * * * * *

Q. About the mid-channel mark? A. About the mid-channel mark" (R. 55-6).

That the tow was swinging athwart-stream was found by the District Court, who attributed the swinging to the tide, saying:

"One condition was, as already stated, that the set of the tide swung the tail of the tow to the eastward and more or less athwart the channel until it had straightened out. It can thus easily be found that the tow was close to mid-channel as the swing into the Schuylkill was about completed" (R. 550).

The Circuit Court of Appeals agreed with the finding of the District Court, saying:

"The *Taurus* with the scows came up the Delaware and rounded into the Schuylkill. She had several hundred feet of scows and hawsers following her. The scows were heavily loaded with sand and gravel, and naturally from the impulse of the tug, the wind and the tide, had a very considerable dead weight straight-ahead impetus. It would, therefore, take some time for the *Taurus* to pull the first breast of barges out of the Delaware tide into the Schuylkill dead water and it would take still further time to pull the last breast of the heavy laden scows in the same direction. The result would naturally be that while the *Taurus* may have been and probably did get to the westward of the channel herself that the tail-end of her tow was considerably out into the mid-channel of the Schuylkill and it would take time to straighten out her tow. We are satisfied from the proof and the circumstances that the tail of the tow was still in the channel when the collision occurred" (R. 580).

The testimony of the pilot of the *Taurus* with reference to the swing of his tow, as well as the finding of the District Court and Circuit Court of Appeals that the tow did swing athwart-channel, is entirely consistent with the testimony of the pilot of the *Gulftrade* that the *Taurus* sheered first to port, then to starboard, which had the effect of swinging the tow to starboard across the course of the *Gulftrade* (R. 376-7).

It is true that the pilot of the *Taurus* testified that the changes of helm were to counteract the effect of the tide, but it is immaterial whether the changes of helm were the cause or the effect of the tow swinging. In either case the tow was swinging athwart-stream. Whatever the reason for the tow swinging athwart the channel, the *Taurus* cannot escape liability for not keeping her tow straight behind her. This is especially so as she was without an assisting tug.

In *The Wrestler,* 232 Fed. 448 (C. C. A. 2nd Cir.), the tug with a hawser tow was held solely at fault on this account. The Court said:

"As the effect of both the wind and the tide would have been to swing the tail of the tug's tow toward New York if she was going straight up in the center of the river at this point, we think the admitted swing of her tail was caused by her own navigation. It may be that to counteract the set of the tide toward New York the tug, which is a powerful one, first ported and then when she got into the eddy tide hard astarboarded.

* * * * * *

"Tugs which have long tows in tidewaters must see to it that they control their tows sufficiently to prevent them from doing harm to other vessels. We think the *Wyomissing* solely at fault" (p. 450).

In *The Aurora,* 258 Fed. 439 (C. C. A. 2nd Cir.), the Court held the hawser tow solely liable for failing to keep her tow in line, saying:

"The cause of the collision, undoubtedly, was the effect of the tide in swinging the tail of the *Aurora's* tow toward Staten Island, but this swing could not be increased by her porting the wheel as she passed the *Busby.* The tow swung so far on the port side that one of the witnesses says he could see the *Aurora's* stern, and she was sheering a little toward Staten Island—this probably due to her porting the wheel. If the tow was following the sheering tug, the tail of the tow must have swung toward Staten Island, considering the loca-

tion as given by the *Aurora's* witnesses of its tow; and considering the space occupied by having four barges abreast, and the fact that the *Aurora's* tow were light barges, it is quite apparent that the *Busby* then was several hundred feet off the Staten Island shore and the *Aurora* crowded her over into this position. * * *

"The fault may well be predicated upon the Aurora alone, with such a long tow in tide waters in an uncontrollable state. She was obliged to keep her tow in line, and if she had not sufficient power to do this alone, it was incumbent upon her to employ helpers. The *Busby* went as close to the Staten Island shore as safety would permit, and we are of the opinion that she should be exonerated from fault" (p. 441).

In *The Madison*, 250 Fed. 850 (C. C. A., 2nd Cir.) a collision between a hawser tow and a tug with a float, the Court held the hawser tow at fault, saying:

"* * * the obligation to keep tows in line was recognized by this court in the case just cited. If the tugs have not sufficient power to do this alone, they must employ helpers, as many do" (pp. 851-2).

See also

The S. S. Wyckoff, 138 Fed. 418;
The R. J. Moran, 299 Fed. 500;
The Genessee, 138 Fed. 549;
The Zouave, 122 Fed. 890;
The Overbrook, 149 Fed. 785;
The Pencoyd, 157 Fed. 134;
Thames Towboat Co. v. *Penn. R. R. Co.*, 157 Fed. 305, 307;
The George W. Childs, 67 Fed. 269.

Counsel for petitioner state that the sole defense pleaded and urged at the trial and upon the argument in the Circuit Court of Appeals (in behalf of the *Gulftrade* and Independent Pier Company) was that the *Taurus* sheered to starboard so

that the scows in her tow were carried to starboard and across the course of the *Gulftrade* (Brief, p. 16). Then counsel mistakenly assert:

"Both the District Court and the Circuit Court of Appeals found against the *Gulftrade* on this issue, * * *" (Brief, p. 16).

A similar statement is made again in petitioner's brief at page 18.

Counsel are mistaken. The allegations of fault in the pleadings of both the Independent Pier Company and the Gulf Refining Company, complain of the *Taurus* for failing to keep her tow tailing properly behind her and for crowding upon the course of the *Gulftrade* (R. 21-2, 28). Furthermore, this point was urged at the trial in the District Court, briefed in the District Court, urged at the argument in the Circuit Court of Appeals and briefed in the Circuit Court of Appeals, as it is in this Court. It is a mere play upon words to assert that the lower courts dismissed the allegation of fault against the *Taurus* to wit, that she "sheered into the course of the *Gulftrade*" (Petitioner's Brief, p. 18). The fact is that both Courts found that the *Taurus's* hawser tow swung to eastward athwart the channel and across the *Gulftrade's* course, thus embarrassing the *Gulftrade* (R. 548, 580).

It is immaterial whether the manœuvre of the tow is referred to as *swinging* or *sheering* athwart-channel. The result is exactly the same in so far as the *Gulftrade* was embarrassed by the swinging tow.

The Thoroughfare (*Southern Pacific Company* v. *Haglund*), 48 Sup. Ct. 511, 1928 A. M. C. 965, referred to in petitioner's brief (p. 14) was not an overtaking situation; it was one of special circumstances. There a steamer, without steam, was lying across the channel. The facts are not comparable with those presented in this case.

Atlas Transportation Company v. *Lee Line Steamers*, 235 Fed. 492 (Petitioner's Brief, p. 14), is analogous to the case at bar only in that both presented an overtaking situation. There the steamship *Rees Lee* attempted to overtake and pass the tug *Josh Cook*, and while doing so became unmanageable and was turned across the channel and into collision with the tug's tow. The Court said:

"The witnesses agree that as soon as the passing signal had been given, the *Josh Cook* yielded some of the channel to the passing boat" (p. 497).

Instead of embarrassing the overtaking vessel, as did the *Taurus* in this case, the *Josh Cook* made room for her.

POINT II

THE INDEPENDENT PIER COMPANY IS LIABLE FOR THE NEGLIGENCE OF ITS SERVANT, MASTER OF THE TUG TRITON, WHO WAS IN CHARGE OF THE NAVIGATION OF BOTH THE STEAMSHIP GULFTRADE AND THE STEAMTUG TRITON.

It is not disputed that the master of the tug *Triton*, was in full charge of the navigation of the *Gulftrade*, as well as the tugs *Triton* and *Churchman*, which were assisting the *Gulftrade*, from the time he went on the steamer's bridge off Fort Mifflin until after the collision. He testified:

"Q. You were in full charge of the navigation of the *Gulftrade* and her two attending tugs? A. Yes, sir; I gave all of the orders that were given there that day.
Q. Were all of those orders obeyed promptly? A. They were" (R. 401).

The District Court so found, saying:

"We make the fact finding that the tug owners (through their servants the masters of the piloting tugs) were the

navigators of the steamship whose negligence, in which all the individual respondents participated, was the proximate cause of the damage done. We conclude from this the liability of such owners" (R. 551).

It is well settled that when the manœuvring of a steamer, using her own propelling power, is directed by a tug master who boards the steamer for that purpose, the tug master is the servant or agent of the tugboat company (in this case Independent Pier Company) and if damage results from the tug master's negligence, the tugboat company is responsible. Indeed, counsel for Independent Pier Company admitted upon the trial that any fault in the steamer's navigation was chargeable to the Independent Pier Company. Mr. Long said:

"Mr. Long: If Your Honor pleases, you are familiar with this situation. You had it in the Kellog case, and you had it in the Paulsboro case. Our captain went on the bridge of this steamer, and gave the orders, we using the steamer's propelling power, and under your Honor's opinion, I think it is only fair to admit that if there is any fault to be found on the part of the steamer, it is going to fall on our shoulders in the end. I say to you, frankly, that I can not see that the steamer was guilty of any fault, and I shall certainly argue to you, very strenuously, that the two tugs were not at fault, because they were not doing anything. If the *Gulftrade* is found at fault by your Honor, the employer or the captain of the *Triton* will have to stand it" (R. 192).

A recent case in the same circuit is *The Caspian,* 14 Fed. 2nd, 1006, 1009, affirmed 14 Fed. 2nd 1013, holding that the tugboat company was responsible for the negligence, if any, of the tug master under similar circumstances.

The cases in the second circuit are to the same effect.

In *The Coamo,* affirmed on appeal, 267 Fed. 686, Dalzell & Company (tugboat company) furnished two tugs to assist the steamer *Coamo,* under her own steam, from Atlantic

Basin, Brooklyn, to American Sugar Refinery Company's pier, Williamsburg, New York. The tugs *W. F. Dalzell* and *Henry Ackerman* were sent to assist the *Coamo*. The master of the *W. F. Dalzell* went on the steamer's bridge and took charge of the manœuvre. The master and third officer of the *Coamo* were on the bridge, and a quartermaster was at the wheel. The *Coamo* proceeded up the East River and rounded to a little below the American Sugar Refinery pier at Williamsburg. The steamer was gradually turned by means of her own engines and assisted by the tugs *Dalzell* and *Ackerman* on either side. While manœuvring in the river the *Coamo* collided with a cattle barge in tow of a tug, damaging the steamer's stern and rudder, also the barge.

Dalzell & Company, in the same position as the Independent Pier Company here, contended that the master of the *Dalzell* did not take charge of the *Coamo's* navigation, and that if he did, he was the servant of the steamship. The District Court held that the steamer was in charge of the tug master; that the collision was due to the tug master's negligence, and that Dalzell, his employer, was liable, as well as the tug of which he was master. Upon appeal the decision was affirmed as to the liability of the tug owner *in personam* and modified by relieving the tug *W. F. Dalzell* from liability *in rem*.

In *The Procida*, 278 Fed. 895, the S. S. *Procida* was being shifted by the tugs *John J. Timmins, Edward G. Murray* and *McCaldin Brothers*. During the operation, the *Procida* came into collision with another vessel and sustained damages for which the owner of the *Procida* brought suit against Edward M. Timmins (tug owner) *in personam* and against the tugs *in rem*. The District Court held Timmins liable *in personam* for the negligence of the tug master who was in charge of

the manœuvre. The Court also held the tug *Edward G. Murray* liable *in rem* and exonerated the other assisting tugs, *John J. Timmins* and *McCaldin Brothers.*

See also *The Sarnia,* 261 Fed. 900.

In the Fourth Circuit the same result has been reached.

The Dorset, 260 Fed. 32;

The John D. Rockefeller, 260 Fed. 982;

The Cromwell, 247 Fed. 207; aff'd 259 Fed. 166.

POINT III

THE STEAMSHIP GULFTRADE IS NOT (SECONDARILY) LIABLE FOR THE NEGLIGENCE, IF ANY, OF THE SERVANT (TUG MASTER) OF INDEPENDENT PIER COMPANY.

The District Court justified holding the *Gulftrade* liable by assuming her negligence. The Court said:

"Assuming the negligence of the steamship, there is no doubt of her responsibility, as she did the damage" (R. 551).

The Circuit Court of Appeals apparently also assumed the *Gulftrade's* negligence inasmuch as the question was not discussed by that Court.

This decision, holding the *Gulftrade* liable *in rem* for the negligence of the servant of the Independent Pier Company, is in conflict with decisions in other Circuits where a tug owner, under these circumstances, is held to be an independent contractor, and solely responsible for any negligence on the part of the tug master.

In *The Dorset,* 260 Fed. 32 (C. C. A. 4th Circuit), the steamship *Dorset,* a twin screw vessel, was moving from her pier, assisted by tugs of the Lambert's Point Towboat Com-

pany. The master of the tug *Pocahontas* went on the steamer's bridge and took charge of the manœuvre. The *Dorset* moved out from the pier under her own engines and when about halfway out, the tug *Crisfield* with barge *No. 18* in tow, bound down the channel, collided with the *Dorset's* stern. The Court exonerated the steamer and held the towing company as an independent contractor, saying:

"It remains to say that the owners of the *Dorset* were not liable for the faults in her navigation. She was under the exclusive control of Mills, not as a pilot, but as the master of the tug *Pocahontas*, employed by the agents of the *Dorset* to take her from the dock and start her to sea, and the tug was actually pushing her in making the manœuvre. Under these circumstances the negligence in the navigation of the *Dorset* was the negligence of the towing company as an independent contractor" (p. 35).

In *The Cromwell*, 247 Fed. 207, affirmed 259 Fed. 166 (C. C. A. 4th Circuit), the steamship *Cromwell* was manœuvring under her own engines in charge of a tugmaster who was on the steamer's bridge. A collision occurred while the manœuvre was in progress. The situation was the same as in the instant case. The Circuit Court of Appeals exonerated the steamer and held the towing company as an independent contractor, saying:

"But the evidence of Henry Whyte shows clearly that Sanders was not a mere pilot of the *Cromwell*, but was the commander of the tug *Gladiator*, under the authority of its owners, who had contracted that the tug should tow the *Cromwell* up the river to the draw where it was to unload. * * * The owners of the tug having thus entered into an independent contract of towing, the tug alone would be responsible for negligence in the undertaking, unless officers of the *Cromwell* retained some control of the ship and were guilty of some negligence. It is true her master and crew were on the *Cromwell*, carrying out the orders of Sanders, but they did nothing more, and in that relation they were mere instrumentalities or means used by Sanders to apply the wheel, engine, and other instruments of navigation—

not participants in the navigation. Hence it seems evident that, if the injury to bridge was due to negligence, it was that of the towing company, owner of the tug, as an independent contractor, for which the *Cromwell* was not responsible" (p. 171).

In *The John D. Rockefeller,* 260 Fed. 982 (E. D. Va.), the same conclusion was reached. There the S. S. *Falls City,* using her own propelling power, assisted by two tugs, collided with the *John D. Rockefeller.* The master of one of the tugs was on the steamer's bridge in charge. The Court held the tug owners alone at fault and exonerated the *Falls City,* saying:

"The law applicable to and fixing the rights of the parties, upon the statements of facts indicated, seems, so far as the courts of the United States are concerned, too well settled now to admit of serious doubt or cavil, whatever may have been its uncertainty at any earlier time, or how much individuals may doubt as to its wisdom; that is to say, where a vessel, herself free from fault, and not contributing to the collision, is in tow of another, the latter having entire control and direction of the tow's movements, and itself capable and suitable for performing the work in hand, being operated and navigated by competent, skilled, and trusted navigators, and damage arises from the negligence of the towing vessel, or those having control of her, it is considered and treated as an independent contractor, and solely liable for the injury caused by its negligence and want of care, and the ship in tow is relieved from liability, although the collision may actually be with that vessel" (pp. 984-5).

Indeed the decision below is contrary to the principle of *Sturgis* v. *Boyer,* 24 How. 110,* where this Court said:

"Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the manage-

* It is to be noted that in *Sturgis* v. *Boyer,* the ship was without her own propelling power.

ment of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have this remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. *Sproul* v. *Hemmingway*, 14 Pick., 1; 1 Pars. Mar. L., 208. *The Brig James Gray* v. *The John Frazer et al.*, 21 How., 184" (p. 123).

In *The Eugene F. Moran*, 212 U. S. 466, both tow and tug were found at fault. This Court, referring to *Sturgis* v. *Boyer, supra*, said:

"In that case it was held that a tug, having control of a vessel in tow, was solely responsible to a lighter upset by the vessel, through the fault of the tug alone * * * We see no reason why the decision should not stand. No doubt the fiction that a vessel may be a wrongdoer, and may be held, although the owners are not personally responsible on principles of agency, or otherwise, is carried further here than in England. * * * Possibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts, that he has done his best to prevent, has been helped by the feeling that it was desirable to have some one who was able to pay. * * * But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended" (p. 474).

See also *The Clarita*, 23 Wall. 1, 11.

Contra The China, 7 Wall 53
Ralli v Troop 157 U.S. 402
The Helen 57 Fed (2) 54, 55

POINT IV

THE TUG TRITON IS LIABLE IN REM FOR THE NEGLIGENCE, IF ANY, OF THE MASTER OF THE TUG TRITON, WHO WAS IN CHARGE OF THE TUG'S NAVIGATION.

This is not a case of where the master of the tug leaves his tug in charge of another person. The record is clear that the master of the *Triton*, although on the bridge of the steamer, was in full charge of the *Triton's* navigation. He testified:

"Q. You were in full charge of the navigation of the *Gulf Trade* and her two attending tugs? A. Yes, sir; I gave all of the orders that were given there that day.
Q. Were all of those orders obeyed promptly? A. They were" (R. 401).

If the master of the *Triton* was guilty of negligence, as both the District Court and the Circuit Court of Appeals have found, there can be only one result, to wit, the tug *Triton* is liable *in rem* for her master's negligence. There is a direct maritime relation between a tug and her tow which is not dependent upon contract. The tug as a legal entity owes her tow a duty of skillful and proper conduct. It is immaterial that the tug master temporarily left his tug and was standing on the steamer's bridge to better conduct the manœuvre. If his orders were improper, such as to constitute negligence, not only he is liable but his tug is liable *in rem*. In other words, a tug cannot, by the mere fact that her master is on the steamer's bridge, exempt herself from liability for her master's negligence.

In *The Arturo*, 6 Fed. 308 (Circuit Court, D. Mass.) cited with approval in *The John G. Stevens*, 170 U. S. 113, 124, two

tugs belonging to different owners, made fast to a ship (barkentine) one on each side, backed her out of a dock and stranded her on a shoal. Both tugs were held liable, although the master of one was in charge of the navigation and the other acted under his directions. The Court said:

"If, therefore, one tug was wholly in fault, as by a defect of her machinery or the like, she alone would be responsible. But for their joint action, so far as it conduced to the loss, I hold them to be jointly responsible. And that is this case" (p. 312).

"If the tow does not command, the tugs do, and they arrange between themselves how the navigation shall be conducted. The rights of third persons do not depend upon their ownership or command. I have taken for granted that there might be a still further relaxation as to any fault distinctly committed by one of them only" (p. 313).

In *The Gallia,* 196 Fed. 509 (S. D. N. Y.), the steamship *Gallia,* without steam, while being shifted from one side of a pier to the other, by three tugs (two owned by McCaldin), went too far astern and came into collision with other vessels. The master of one of the tugs of W. J. McCaldin went on the steamer's bridge and took charge. The Court held both McCaldin tugs liable *in rem* and exonerated the third tug.

In *The Mexpet,* decided January, 1921 (S. D. N. Y.) not reported; reversed on the merits, 288 Fed. 718 (C. C. A. 2nd Cir.), all four tugs were held liable *in rem* for the stranding of the steamship *Gargoyle* while being shifted in New York Harbor. The master of one of the tugs was on the steamer's bridge in charge of the manœuvre at the time. The steamer's master and third officer were also on the bridge. A libel was filed by the owner of the steamer against the four tugs *in rem.* The towboat owners were not proceeded against *in personam,* as in the instant case.

The District Court did not find any fault on part of any of the tugs, but found that the stranding was due to the negligence of the master of the *Dalzelline* (tug master on the steamer's bridge in charge), and held all four tugs liable *in rem* upon the theory that if the tug master in charge was at fault,

"all the tugs were at fault, not by imputing his fault to them, but because each tug contributed to directing the *Gargoyle* out of her proper course and putting her ashore."

In the instant case if the *Gulftrade's* navigation was improper, it was due to the negligence of the master of the tug *Triton,* who was on the steamer's bridge in full charge of the navigation of both steamer and tugs. Admittedly all his orders were carried out properly. He cannot so divorce himself from his tug that the tug should not be cast in damages for his negligence. It is immaterial whether his station, while handling the steamer, was in his own pilot house or on the bridge of the steamer. If the mere fact that the tug master was on the steamer's bridge is sufficient to exonerate the tug, it would be a simple expedient in all cases involving the relation between tug and steamer for the tug master to give his orders from the steamer.

When a tug participates in an erroneous manœuvre, which is the proximate cause of damage, the tug is an offending *res.* Her participation may consist of following an improper order from her own master, who is on the bridge of a steamer alongside, or failing to act because the order is not given by her own master, or for improperly executing the order. The result is the same.

If the tug *Triton* is not liable *in rem* under these circumstances, *i. e.,* her own master having been found guilty of negligence, tugboat owners can avoid liability for negligence

by arranging a chartering or operating company of no financial responsibility. That company would supply the commanding navigator, and the latter, standing upon the steamer's bridge, would direct all the manœuvres of the tugs, which would then be exempt from all liability so long as they obeyed his instructions.

CONCLUSION

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED, AND THE CAUSE REMANDED WITH DIRECTIONS TO ENTER A DECREE DISMISSING THE LIBEL OF THE CHARLES WARNER COMPANY AGAINST THE GULFTRADE.

Respectfully submitted,

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